Demak Motor Corp Sdn Bhd v Moi Fong @ Moi Bee Fong

HIGH COURT (KUCHING) — ORIGINATING MOTION NO 25–12–05–III(II)
DAVID WONG JC
13 OCTOBER 2005

Civil Procedure — Transfer of action — From sessions court to High Court — One concerns goods sold and delivered and the other an allegation of fraud on minority — Whether common questions of law and facts exist — Whether transfer premature

The applicant/defendant applies (encl 3) to transfer the sessions court case Summons No 52–703–2004–I from the sessions court to the High Court and the other to consolidate the sessions court case with the High Court Originating Petition No 26–3–2004–III(II) (originating petition) into one suit. The sessions court case involves a claim for goods sold and delivered and counterclaim of a fundamental breach of contract. As for the originating petition, it involves an allegation of fraud on minority shareholder.

Held, dismissing the transfer application:

(1) In comparing the pleadings of the sessions court case and the originating petition, one can reasonably conclude that the cause of action and relief of both the actions are completely different. There are no common questions of law and facts. One concerns goods sold and delivered and the other an allegation of fraud on minority. Further the parties in both suits are completely different (see para 5).

(2) The issue which arises here is whether or not encl 3 in so far as the application for transfer is premature in view of the fact that the applicant/defendant's counsel had at no time written to the respondent/plaintiffs counsel to seek their consent for this matter to be tried in the sessions court (see para 10).

(3) Before an application for transfer can be made an attempt to reach an agreement to have the matter tried in the sessions court must be made. Only when an agreement cannot be reached, then an application can be made (see *Country Heights Marketing v Firstland Management* [1998] 3 CLJ 17). This makes sense especially in a case where as in this case there is a counterclaim in excess of RM250,000. The jurisdiction of the sessions court in civil matters is unlimited save and except in monetary value of RM250,000. Hence there is no reason that the parties should not agree to have the matter tried in the sessions court when there is a counterclaim in excess of RM250,000. The fact that the respondent/plaintiff is objecting now to this application to transfer shows that they are willing to have the counterclaim tried in the sessions court see paras 11–12).

[Bahasa Malaysia summary

Pemohon/defendan memohon (kandungan 3) untuk memindahkan kes mahkamah sesyen Saman No 52–703–2004–I dari mahkamah sesyen ke Mahkamah Tinggi dan juga mengabungkan kes mahkamah sesyen dengan kes Mahkamah Tinggi Petisyen Pemula No 26–3–2004–III(II) (petisyen pemula) menjadikannya satu tindakan. Kes mahkamah sesyen meliputi tuntutan untuk barangan yang dijual dan dihantar serah dan tuntutan balas untuk kemungkiran kontrak asasi. Sementara petisyen pemula, adalah berhubungan dengan dakwaan fraud terhadap pemegang saham minoriti.

Diputuskan, menolak permohonan pemindahan:

(1) Dalam membandingkan pliding-pliding mahkamah sesyen dan petisyen pemula, seseorang dapat menyimpulkan bahawa kausa tindakan dan relif kedua-dua tindakan adalah berlainan sama sekali. Tiada soal undang-undang dan fakta yang sama. Satu adalah berhubungan dengan barangan yang dijual dan di hantar serah dan satu lagi dakwaan fraud atas minoriti. Lagipun, pihak-pihak kedua-dua tindakan adalah berlainan sama sekali (lihat perenggan 5).

(2) Isu di sini ialah sama ada kandungan 3 di mana permohonan untuk memindahkan kes tersebut adalah pra-masa memandangkan fakta bahawa peguamcara pemohon/defendan telah tiada sebarang masa pun menulis kepada peguamcara responden/plaintif untuk mendapatkan persetujuan mereka untuk perkara ini dibicarakan di mahkamah sesyen (lihat perenggan 10).

(3) Sebelum sesuatu permohonan untuk memindahkan kes tersebut dapat dibuat, satu percubaan untuk persetujuan untuk kes ini dibicarakan di mahkamah sesyen harus dibuat. Hanya apabila persetujuan tidak dapat dicapai, maka satu permohonan dibuat (lihat *Country Heights Marketing v Firstland Management* [1998] 3 CLJ 17). Ini adalah munasabah terutama dalam kes di mana seperti di dalam kes ini, tuntutan balas adalah melebihi RM250,000. Bidang kuasa mahkamah sesyen dalam perkara sivil adalah tidak terhad kecuali sekiranya nilai kewangan tidak melebihi RM250,000. Dengan itu tiada alasan kenapa pihak-pihak tidak dapat bersetuju untuk perkara ini dibicarakan di mahkamah sesyen di mana terdapat tuntutan balas lebih daripada RM250,000. Responden/plaintif yang membantah permohonan ini untuk dipindahkan menunjukkan mereka sanggup untuk tuntutan balas dibicarakan di mahkamah sesyen (lihat perenggan 11–12).]

Notes

For a case on transfer of action from sessions court to High Court, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index para 6844.

Cases referred to

Country Heights Marketing v Firstland Management [1998] 3 CLJ 17 (refd)

Legislation referred to

Subordinate Courts Act 1980 ss 65, 66

KC Wong (KC Wong & Associates) for the plaintiff.
Arthur Lee Cheng Chuan (Siti Emiliana with him) (Aurther Lee, Lin & Co) for the defendant.

David Wong JC:

INTRODUCTION

[1] By way of encl 3, the applicant/defendant applies for the following orders:

(1) that Summons No 52–703–2004–I (sessions court case) be transferred from the sessions court to High Court Kuching, Sarawak, and

(2) the said matter (sessions court case) be consolidated with High Court Originating Petition No 26–3–2004–III(II) (originating petition), Petitioner — Tan Hock Beng v Respondent — Gao Rong & 9 others;

(3) any pleadings or any Order (if any) granted at the sessions court in respect of the Summons No 52–703–2004–I and at the High Court in Originating Petition\s No 26–3–2004–III(II) subsequent thereto do stand;

(4) the action to proceed as if it had been originally instituted in the High Court.

[2] There are two applications before this court, one for a transfer the sessions court case from the sessions court to the High Court and the other to consolidate the sessions court case with the originating petition into one suit.

CONSOLIDATION

[3] I shall deal with the consolidation issue first. The sessions court case involves a claim for goods sold and delivered and counterclaim of a fundamental breach of contract, (exhs M1 and M2 in encl 3). As for the originating petition (which is not exhibited in encl 3), it involves an allegation of fraud on minority shareholder where the reliefs asked for are:

(1) an order to compel the 1st, 2nd 3rd, 4th, 7th, 8th and 9th respondents pursuant to the Memorandum and Articles of Association that:-

   (i) all existing shareholders of the 10th respondent company do repurchase the petitioner's 20% shares in the portions that they currently hold shares in the 10th respondent company for a consideration to be based on a valuation, which is to take into account and to be based on the profits made by the 10th respondent company from its previous marketing operations as reflected in the Draft Trading and Profit & Loss Accounts as for the market value therefore; and

   (ii) until the shares are repurchased by the 10th Respondent company's existing shareholders, that the other Directors of the 10th respondent company do

deliver to the petitioner all the documents referred to in the Draft Trading and Profit & Loss Accounts of the 10th respondent company within seven days of the date of order to be audited by a independent auditor and in the event of failure to do so, that the court do appoint such auditor by order of court with power to do so from this honourable court whose remuneration is to be fully paid by the 10th respondent company.

(2) an order that the 1st, 2nd, 5th, 6th 7th and 8th respondents collectively as the Board of Directors of the 10th respondent company be restrained and prevented from transferring the distributorship rights of the 9th respondent company's products granted to the 10th respondent company to another legal entity until the outcome of this action or further order.

[4] The legal principles applicable in matter of consolidation are set out in O 4 of the Rules of the High Court 1980 which states as follows:

(1) Where two or more causes or matter are pending, then, if it appears to the Court —

(a) that some common question of law or fact arises in both or all of them; or

(b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or

(c) that for some other reason it is desirable to make an order under this rule.

the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.

[5] In supporting the application, the applicant in her affidavit (para 7 of the affidavit in support in encl 3) merely states that the facts in the sessions court case are substantially based on the facts in originating petition without going into specifics. As stated earlier by me the originating petition was not even attached as an exhibit in encl 3. However comparing the pleadings of the sessions court case and the originating petition, one can reasonably conclude that the cause of action and relief of both the actions are completely different. There are no common questions of law and facts. As stated by me above one concerns goods sold and delivered and the other an allegation of fraud on minority.

[6] Further, the parties in both suits are completely different. The applicant in her attempt to link the two cases discloses that the petitioner in the originating petition is in fact her son and manager of a firm called Huat Ming Motor Trading which she is a sole proprietor. How this connection has any bearing on this application I, with respect, cannot see. In the originating petition, the petitioner seeks reliefs from the nine directors and shareholder of the Demak Motors Corp Sdn Bhd on the ground of fraud on minority shareholders. The petitioner sues as a director and shareholder of Demak Motors Corp Sdn Bhd who happens to the Plaintiff in the sessions court case.

[7] For the foregoing reasons, I dismiss the applicant/defendant's application to consolidate the sessions court case with the originating petition with costs to the respondent/plaintiff.

TRANSFER OF THE SESSIONS COURT CASE

[8] The brief facts are as follows:

The respondent/plaintiff sued the applicant/defendant for goods sold and delivered for the sum of RM96,748.37 under the sessions court case on 21 October 2004. This matter came up for mention on the 7 Jnauary 2005 and the defense and counterclaim of the applicant/defendant were filed on the 17 March 2005. The counterclaim against the respondent/plaintiff was for the sum of RM2,789,925 prompting this application to transfer the sessions court case to the High Court.

[9] The relevant legislations are ss 65 and 66 of the Subordinate Courts Act 1980 which reads as follows:

65. Civil jurisdiction of sessions courts.

(1) Subject to the limitations contained in this Act, a sessions court shall have —

(a) unlimited jurisdiction to try all actions and suits of a civil nature in respect of motor vehicle accidents, landlord and tenant and distress; and

(b) jurisdiction to try all other actions and suits of a civil nature where the amount in dispute or the value of the subject-matter does not exceed two hundred and fifty thousand ringgit.

(2) (Repealed).

(3) When the parties to an action or suit which, if the amount in dispute or value of the subject-matter thereof did not exceed the limit of the jurisdiction, would be cognizable by a sessions court, have entered into an agreement in writing that the sessions court shall have jurisdiction to try the action or suit, the sessions court shall have jurisdiction to try the same, although the amount of the subject-matter thereof may exceed the value limit of jurisdiction.

(4) Every such agreement shall be filed in the sessions court and, when it is so filed, the parties to it shall be subject to the jurisdiction of the sessions court.

66. Counterclaims in sessions courts and transfers therefrom

(1) Where in any action or suit of a civil nature before a sessions court any defence or counterclaim of the defendant involves matters beyond the jurisdiction of the Court, the defence or matter shall not affect the competence or the duty of the sessions court to dispose of the whole matter in controversy, so far as relates to the demand of the plaintiff and any defence thereto, but no relief exceeding that which the Court has Jurisdiction to award shall be given to the defendant upon the counterclaim.

(2) In any such case the High Court may, if it thinks fit, on the application of any party, order that the action or suit be transferred to the High Court, and the action or suit shall then be entered in the cause book or register of civil suits of the High Court, and proceeded with as if the action or suit had been originally instituted therein.

[10] The issue which arises here is whether or not enclosure 3 in so far as the application for transfer is premature in view of the fact that the applicant/defendant's counsel had at no time written to the respondent/plaintiffs counsel to seek their consent for this matter to be tried in the sessions court.

[11] The learned Judge in *Country Heights Marketing v Firstland Management* [1998] 3 CLJ 17 appears to have taken the view that before an application for transfer can be made an attempt to reach an agreement to have the matter tried in the sessions court must be made. Only when an agreement cannot be reached, then an application can be made. The learned judge states as follows:

> Notwithstanding the general value limit of jurisdiction of the sessions court, s 66(1) allows the sessions court to proceed with such counterclaim provided that an award at the end of trial should not exceed the value limit of jurisdiction. Also the parties could make agreement under s 65(3) of the Act to continue in the sessions court. There is thus no automatic right of transfer merely because a counterclaim exceeds the value limit jurisdiction of the sessions court. These provisions are there to prevent defendants to delay actions or suits in the sessions court by filing counterclaims claiming beyond the value limit of that court.

[12] What the learned judge says in my view makes sense especially in a case where as in this case there is a counterclaim in excess of RM250,000. The jurisdiction of the sessions court in civil matters is unlimited save and except in monetary value of RM250,000. Hence there is no reason that the parties should not agree to have the matter tried in the sessions court when there is a counterclaim in excess of RM250,000. The fact that the respondent/plaintiff is objecting now to this application to transfer shows that they are willing to have the counterclaim tried in the sessions court. Hence, I hold that the applicant/defendant's application to be premature.

[13] Based on the foregoing reasons, I also dismiss the applicant/defendant's application for the transfer of the sessions court case to the High Court with costs to the respondent/plaintiff.

Application for transfer dismissed.

Reported by Sally Kee